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April 14, 2010

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve
20th Street and Constitution Avenue, NW
Washington, DC 20551

RE: Docket No. R-1384

The National Retail Federation ("NRF") appreciates the opportunity to respond to the Federal Reserve Board's ("Board's") request for comment with respect to proposed rules implementing the "fees" provisions of the Credit CARD Act. As the world's largest retail trade association and the voice of retail worldwide, NRF's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion. Our members with credit programs assess fees in a number of circumstances. Of particular note here, fees may be incurred when promises of payment for goods or services are not fulfilled.

Retailers offer credit through a number of mechanisms: either directly ("proprietary credit") or in conjunction with an issuer-partner who provides credit in the retailer's name ("private label"). Compared to general purpose bank cards, proprietary and private label (collectively "store branded") cards tend to have lower credit limits – because they typically are used exclusively at the denominated retailer - and have slightly higher minimum monthly payments – so as to encourage consumers to pay down their balances more quickly. As with general purpose cards, fees may be assessed when a periodic payment (owed directly to the retailer or its issuing partner) is not paid, or when a check in payment is dishonored.

Fees are a common by-product of providing goods and services, in part, on the basis of trust. Typically no security interest is involved with store branded cards. Rather, each customer is expected to honor a contract calling for repayment for delivered goods and services. While the contract might also include finance charges, the most critical element from the merchant's perspective is that payments for goods and services delivered be made.

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It has been our industry's experience that, in their use of credit, consumers effectively view proprietary, private label and general purpose cards as a broad array of partially interchangeable lines. For example, some consumers use store branded cards to secure discounts or retailer-specific bonuses and use general purpose cards for larger purchases, such as family entertainment or vacations. This flexibility extends over into the payment arena. Each open-end account generates a periodic statement. Consumers may choose to pay all of their lines in full when due, revolve them all, or create some other fungible combination. From the consumer's perspective, collectively, they are her credit card lines.

Retailers obviously want customers to shop in their establishments and do not want to alienate customers with unnecessarily high fees. They try to maintain the customer's loyalty and connection to their store. Consequently, when retailers initiated late fees on proprietary cards, they were imposed less to generate income than they were to encourage consumers to make contracted-for payments. Although some may perceive them as penalties, awareness of the fees actually can serve to deter breaches.

Fees serve other purposes as well. To some extent they compensate credit grantors for costs associated with rehabilitating a customer who has failed to live up to the terms of the underlying agreement. Such costs may be in the form of additional mailings or other communications. Fees also help ensure that some portion of the heightened risk of default is borne by the breaching individual rather than by all cardholders.

NRF supports the concept in the CARD Act that fees should be proportionate and reasonable. By that, we understand it to mean that fees should both be proportionate to the harm portended by an individual's failure to make regular payments, compensatory to the extent merchants or issuers must take steps to address any breach of payment terms, and adequate to discourage individuals from failing to make payments in the future. The Board proposes to address these issues, in part, by setting an upper bound, equal to the minimum monthly payment on many such penalties (226.52(b)(2).

Attempting to addressing all three of these issues with a single fee formulation is a start; but, in practice, there is a fourth consideration that is important as well. As a matter of equity and more, fees for similarly perceived breaches should be comparable – though not necessarily identical, to fees imposed for other such failures. Comparability is an important factor if a fee is to have the desired incentivizing effect.

Consider two related examples. Suppose an individual, anxious to conserve funds for the coming weekend, has three open-end revolving accounts that are coming due and knows that two of them assess late fees of $30 and $35 respectively, while the third assesses only $10. All things being equal the individual likely will pay the former two and, if he thinks it necessary, defer the latter. However, once the latter creditor realizes that it has failed to receive the required payment, that creditor would not know whether the failure was the action of a customer who was temporarily late, or the action of a customer taking the first steps toward serious default. Since it is generally easier (and ultimately less expensive) to cure a default in the early stages, the creditor likely would initiate rehabilitation efforts.

Alternatively, the customer may have affirmatively decided that he was not going to pay one of his three creditors in a given month, regardless. If all three creditors had comparable fees, the likelihood is that the choice of the creditor not paid would be somewhat random. Each would be forced to initiate rehabilitation efforts approximately 1/3 of the time. However, if one creditor's late fees were consistently and absolutely cheaper than the others, that creditor is more likely to be selected for non-payment 100 percent of the time and thus bear disproportionately higher rehabilitation and collection costs relative to others.

Consequently, we ask that the Board, in devising its Safe Harbor, not adopt a formulation that would consistently cause private label retail cards late fees to be the least incentivizing alternative. A methodology that consistently results in more modestly lined private label cards going "to the bottom of the bill stack" is likely to cause them to become disproportionately expensive to offer, and ultimately deprive consumers of some of the utility, flexibility and savings that private label cards provide.

To be more specific, it is not uncommon for a general purpose card to have a $5,000 credit line of which $2,000 might be in use at a given time. Similarly, many private label cards commonly have a $750 line of which $300 may be used in a given month. If the minimum payment on the former were 2¼ percent while that on the private label card were 3 percent, the minimum payments would be $45 and $9, respectively. A 226.52(b)(2) formulation that caps late fees at the minimum payment, regardless of the Safe Harbor calculation, could cause a more than four-fold difference in the fees these two open-end creditors could charge. Restricting fees in that manner would be a serious disincentive to timely payment of the latter card line.[1]

The Board is considering adoption of a safe harbor fee (226.52(b)(3)) that could be assessed without forcing smaller creditors to undertake the yearly expense of a laboriously calculated "deterrence" based fee. We applaud that effort, and encourage the Board to adopt a fee that would reasonably reflect the broad industry costs associated with achieving effective deterrence. However, we note that because the proposal would require any imposed fee to be subject to the limit contained in 226.52(b)(2) it could not exceed the minimum payment. This would not cure the problem discussed above.

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[1] In the absence of resources to develop one of the more sophisticated models (cost or deterrence) proposed by the Board, an alternative proposal limiting late fees to no more than 5 percent of the minimum monthly payment – 45 cents in this example – would have a devastating effect on open end payment incentives. While a 5 percent of periodic payment formulation may be appropriate for contracts involving secured investments with large minimum payments, such as mortgages, such situations are not comparable to a small, unsecured credit line. We ask that the Board **not** adopt that formulation for open end plans. Instead, we prefer a denominated safe harbor amount as expressed in the balance of this comment.

In order to not generally dis-incentivize payments to one group of cards and to achieve some level of comparability and equity, we ask that the Board adopt a formulation that would allow a credit grantor to potentially impose the Board denominated safe harbor dollar amount even if that amount should *exceed* a particular minimum monthly payment. While such a formulation would not necessarily eliminate the discrepancy between store brand and general purpose credit grantors in all instances, it could significantly narrow the gap, while still setting a reasonable upper bound on fees. Indeed, for the customer satisfaction reason discussed above, many retailers would be loathe to impose the maximum of any range the Board might permit. However, the greater comparability among open-end credit lines that such a formulation would allow, would also help ensure that the primary purpose for which the store branded card fees are imposed would less likely be undermined.

We appreciate the opportunity to file these comments and would be happy to answer any additional questions you may have.

Respectfully submitted,

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